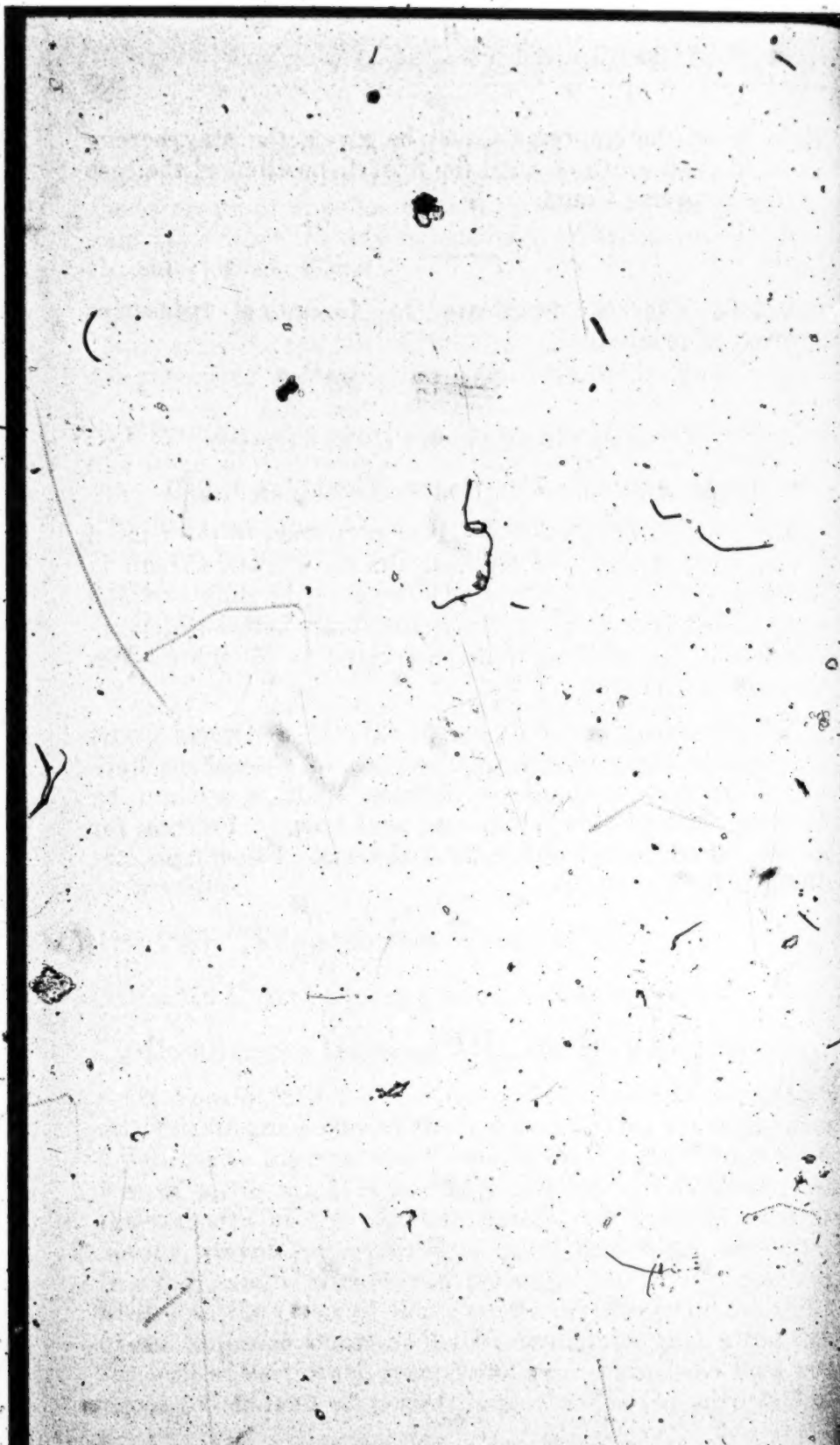

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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1930.

No. [redacted] 52

SOUTHERN RAILWAY COMPANY, a Corporation,
Petitioner,

vs.

EDWARD WALTERS, a Minor, by HERMAN WALTERS,
His Father and Next Friend,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT AND BRIEF IN SUPPORT THEREOF.

H. O'B. COOPER,
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St. Louis Law Printing Co., 415 North Eighth Street. ' CEntral 4477.

SUBJECT INDEX.

Page

Petition for a writ of certiorari.....1-22
Summary statement of matter involved..... 1
Reasons relied on for allowance of writ..... 17
Prayer for writ..... 21

Brief in support of petition for writ of certiorari....23-45
I. The opinions of the court below..... 23
II. Jurisdiction 24
III. Statement of the case..... 26
IV. Specification of errors..... 27
V. Argument 29

Summary of argument:

Point A. A verdict should have been directed for petitioner 28, 29

Point B. The Court did not exercise sound judicial discretion in passing upon the motion for a new trial 29, 38

Table of Cases Cited.

Atlantic Coast Line v. Davis, 279 U. S. 34.....30, 31
Atlantic Coast Line v. Driggers, 279 U. S. 787..... 30
C. M. & St. P. Ry. Co. v. Coogan, 271 U. S. 472...30, 31, 32
City of Des Moines v. Des Moines Water Co., 230 Fed. 570-574 39
Delaware R. Co. v. Koske, 279 U. S. 7.....30, 31
Eureka Tool Company v. Wire Rope Appliance Co., 265 Fed. 669..... 39
Felton v. Spiro, 78 Fed. 576.....38, 43, 44
Gunning v. Cooley, 281 U. S. 90 (Adv. Sheets, Vol. 1).19, 30
Hardy-Burlingham Mining Company v. Baker, 10 F. (2nd) 277, 278, 279..... 30
Improvement Co. v. Munson, 14 Wall. 442-448..... 30

In re Sobol, 242 Fed. 487-489 39
Insurance Co. v. Randolph, 78 Fed. 754 39
Kansas City Southern R. R. Co. v. Jones, 276 U. S. 303 30
Lamborn v. Woodard, 20 Fed. (2nd) 635-637 31
Mattox v. U. S., 146 U. S. 140 39
M. & R. V. Ry. Co. v. U. S., 270 U. S. 280 31
Norfolk and Western R. R. Co. v. Collingsworth, 32 Fed. (2nd) 561 30
N. Y. C. R. Co. v. Ambrose, 280 U. S. 486 31
Paine v. St. Paul Union Stock Yards Co., 28 Fed. (2nd) 463 40
Pleasant v. Fant, 22 Wall. 116-122 30
Railroad Company v. Moon, 121 U. S. 558, l. c. 570 41
Ry. Co. v. Lowery, 74 Fed. 463 39
Slocum v. N. Y. Life Ins. Co., 228 U. S. 364-369 30
Small v. Lamborn Co., 267 U. S. 248-254 ..... 30, 31, 32
St. L. & S. F. Ry. Co. v. Mills, 271 U. S. 344 30
St. L. I. M. & S. Ry. Co. v. McWhirter, 229 U. S. 265 .. 30
Union Tool Co. v. Wilson, 259 U. S. 107-112 39
United Press Association v. National Newspaper Association, 254 Fed. 284-285 39
Winchester Repeating Arms Co. v. Olmsted, 203 Fed. 493 39
W. & A. R. R. Co. v. Hughes, 278 U. S. 496 30

Table of Statutes Cited.

Judicial Code, Sec. 240, as amended by Act of February 13, 1925, 43 Stats. 938 ..... 24, 26
U. S. Code Annotated, Title 28, Vol. 4, p. 359 24

Textbooks and Encyclopedias Cited.

Roberts Federal Liability of Carriers (2nd Ed.), Vol. 2, Sec. 1028, pp. 1970-1971 30

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1930.

No. .....

SOUTHERN RAILWAY COMPANY, a Corporation,
Petitioner,

vs.

EDWARD WALTERS, a Minor, by HERMAN WALTERS,
His Father and Next Friend,
Respondent.

PETITION FOR WRIT OF CERTIORARI.

MAY IT PLEASE THE COURT:

The petition of the Southern Railway Company respectfully shows to this Honorable Court:

A.

SUMMARY STATEMENT OF THE MATTER INVOLVED.

This cause was filed to the February Term, 1929, of the St. Louis Circuit Court, to recover $65,000 damages on account of injury sustained by respondent, aged 6 at the time, in an alleged crossing accident at the intersection of Bond avenue and petitioner's Dyke yard tracks in East

St. Louis, Illinois, on March 3, 1927 (R. 4). After the removal to the United States District Court (R. 7) respondent, on April 24, 1929, filed an amended petition (R. 12). Inasmuch as the Court in its charge to the jury withdrew from the consideration of the jury all of the allegations of negligence charged in the petition except one (R. 165, 166, 167 and 168), the only material allegation of the petition necessary to be considered here is the alleged violation of an order of the Illinois Commerce Commission, dated October 20, 1926, which order required trains of the petitioner, upon passing over said crossing, to come to a stop and required one of the crew to flag said crossing and to warn all persons attempting to cross said crossing of the approach of said train (R. 12). The amended petition alleged a negligent violation of this order and that respondent was injured as the proximate result thereof. Petitioner's amended answer was a general denial (R. 27).

At the first trial of the cause in the United States District Court the jury failed to agree (R. 180). At the second trial in the District Court in November, 1929, a jury verdict was rendered in favor of respondent for $43,000 (R. 178). Written motion for a new trial was filed by petitioner on November 16, 1929 (R. 180). The motion was argued and submitted December 2, 1929 (R. 180), and overruled December 10, 1929, after a remittitur of $15,000, made by direction of the Court, had been

entered, thereby reducing the judgment to $28,000 (R. 184).

The case had previously been tried once in the United States District Court at East St. Louis, Illinois, resulting in respondent taking a nonsuit after the Court had intimated that it would direct a verdict (R. 180).

Petitioner duly prayed for and was allowed an appeal to the United States Circuit Court of Appeals for the Eighth Circuit. The appeal was heard in that court and resulted in an affirmance of the judgment of the trial court on February 14, 1931 (R. 212; opinion of Court of Appeals, R. 205 to 212). Petitioner filed its petition for rehearing (R. 215), which was denied on March 18, 1931 (R. 231).

The accident in question happened about 2:50 p. m. on March 3, 1927. Bond avenue runs east and west and the double-track railroad of petitioner runs north and south. Pictures in evidence (R. 188, 190, 191, 193, 195, 197) and the plat (R. 201) show the physical conditions at and near the place of the accident. Bond avenue is a public street, paved with brick, is thirty-six feet from curb to curb of the brick pavement, and has on each side a concrete sidewalk six feet wide. The Franklin public school is located on Bond avenue west of the tracks and south of Bond avenue.

Respondent was a pupil at the Franklin School and claims to have been going home from school and that, while crossing the railroad tracks on Bond avenue from

west to east, he was hit by the engine. The injury consisted of the loss of one leg and damage to the toes of the other foot.

To recover it was necessary for respondent to prove the following facts:

a. That he was on Bond avenue at the time of his injury, and that he was crossing, or attempting to cross, Bond avenue at the time.

b. That he was hit by the front end of the engine, considering the front end as the forward part of the engine the way the train was moving at the time.

c. That petitioner's servants violated the order of the Commission and did not before passing over Bond avenue come to a stop and require one of the crew to flag the crossing and warn all persons attempting to cross the crossing of the approach of the train.

d. That such failure of the crew, if they did so fail, was the direct and proximate cause of respondent receiving the injury.

The engine in question was pulling fifty cars, and while at the head end of the train, was pulling the cut of cars with the tender in front.

Upon the question raised by petitioner that a verdict should have been directed in its favor, it is necessary, briefly, to review the evidence adduced:

Mrs. Corda Pettit testified (R. 29) on direct examination that she did not observe the train stop. She was traveling north on Tenth street, which is about two blocks

east of and parallel with the tracks, and turned west on Bond avenue. When she first saw the train it was going across Bond avenue (R. 28) and the engine had crossed Bond avenue and (R. 31) the engine and first cars were over Bond avenue before she ever saw it. The Court then interrogated the witness (R. 32), and from her answers it is apparent that she did not know and could not know whether the train stopped before it crossed Bond avenue because she did not see the train until after it had crossed Bond avenue. She did not see the boy until after the accident.

Mrs. Edith O'Dell did not see the boy until the train had crossed Bond avenue (R. 36). She negatively testified (R. 40) that she did not see any men on any portion of the engine.

Thomas Heher was in a filling station at Eighth and Bond avenue, half a block away. He heard a lady scream and went to the scene of the accident and saw respondent under the train (R. 45). When he got to the scene of the accident, more than half a block away, only the engine and six cars had crossed the street. He does not testify at all as to whether the train stopped or as to what part of the engine hit the boy. He had seen the train before he went to the filling station, when it was half a block south of Bond avenue, at which time he was going east to the filling station (R. 53). He testified (R. 52) that it took the train ten minutes to go from half a block south of Bond avenue to six car lengths north of Bond avenue, which was where

it was when he got to the railroad track (R. 53). His testimony as to speed of fifteen miles an hour was rejected by the trial judge, first, in refusing to let the case go to the jury on the question of speed, and, second, in commenting upon the witnesses' testimony (R. 184).

John McKenzie was traveling north on Tenth street, more than two full blocks east of the railroad tracks. He says he intended to pass in front of the train; he looked down one street and saw the train moving; he looked down another street, which was Bond avenue, and saw the train moving (R. 60). In between the street intersections he was not able to see the train. He does not know what happened while he was between the different street intersections, and he positively says that he did not know whether the train stopped while he was between the intersections or not, as he could not see what it did then (R. 62). When he got to Bond avenue and turned west the rear end of the engine was just passing over Bond avenue and was right in front of him (R. 64). He was then 700 feet from the railroad tracks. He did not testify, as stated in the opinion of the Court of Appeals, that the train was traveling at a speed of fifteen miles an hour; instead, he testified (R. 64) that his automobile was traveling at the rate of fifteen miles an hour in going the 700 feet from Tenth street to the tracks, and that only six or seven cars passed over Bond avenue while he was traveling this distance of 700 feet. A car is forty to fifty feet in length; therefore, the train moved from 240 to 350 feet while he was traveling

700 feet, and he was traveling at a rate of speed of fifteen miles per hour. Judge Faris rejected this evidence (R. 184).

Ruth Schiele was a pupil at the Franklin School and was eleven years old. With reference to her testimony the trial judge said (R. 180):

> "'She says she was looking out of the window on the landing and saw appellee and the other three boys in front of the train and saw appellee struck.'"

She testified that respondent was hit by the train—by the engine (R. 69). She does not say what part of the engine the boy was hit by. She was in the school yard, and she could not see on account of the board fence, unless there was an opening in it. She testified that she saw through a gate which was in the board fence on Bond avenue, and that if this gate was closed she could not see the crossing (R. 72); that the board fence was about a foot higher than her head and that she could not see over the board fence, and that the only place that she could see would be through an opening in the board fence, and that if there was not a gate through which she could see that she couldn't see anything (R. 78-79). She finally identified the gate she saw through as on Bond avenue and thirteen feet from the fence which runs parallel with the track. The map (R. 201), Exhibit 3 (R. 195), the testimony of Guthrie, the engineer (R. 156-160) and the un-

disputed testimony shows that there is no gate there and that the only gate is from the schoolhouse to Bond avenue and at a place where, even if it was open, nothing could be seen through it from where she was. To see through the only gate there she would have had to have looked directly north the length of the concrete walk and thence west to Bond avenue. She does say that the train did not make any stop (R. 74). She is the only witness who testified that it did not stop, but under the physical circumstances she could not know whether it did or not, because she could not see it.

James Goodwin was eleven at the time of the trial. The trial judge reviews his testimony (R. 181) and says that it is the only reasonable testimony offered by respondent and that it corroborates in every respect the testimony of the train crew. Goodwin does not know whether the train backed up or not, but testified that there was a car in front of the engine and that the part of the train that struck respondent was the back part of the engine, and that the car ahead of the engine had already gone over the crossing before the boy was struck (R. 91). Further, that the box car (R. 92) got by respondent before he was hit, and he testified positively (R. 92) that the boy was hit by the part of the engine that was in the back. He evidently mistook the tender for a car, but he positively testified that the boy was hit by the back part of the engine. He did not testify as to whether or not the train stopped.

Respondent was six years old at the time of the accident

and had only been going to school two or three weeks before the accident. He knew that trains ran on the tracks (R. 94, 97, 98). He testified that he was walking across the tracks on the south side; that he saw the train when it was half a block away and when he was in the middle of the track (R. 98); that the train was coming from the north, and that the engine was across Bond avenue when the front part of the engine struck him. He further testified that the front end of the train that truck him was the part with the headlight on it, and that it was up in front (R. 101), and that there was a cowcatcher on the end that hit him (R. 104), and that cowcatcher was on the front part of the train, and that was the part of the train that struck him. He testified on direct examination that he did not see the train until it hit him, but afterwards corrected this by saying he saw it one-half block away. At different times he had the train going north and south. He testified nothing in regard to whether or not the train stopped.

B. F. Ward (R. 101) was operating the filling station where Heher was filling his car. He knew nothing about the accident until he heard a scream and he looked over and saw appellee under a car, and at that time two cars and the engine had passed. He knew nothing about where the boy was hit or whether or not the train stopped.

Five witnesses for petitioner testified positively that the train did stop before crossing Bond avenue, and that Lane, the switchman riding on the front footboard, flagged the

crossing before the train went over Bond avenue, and that no boy was hit by the front end of the engine. These witnesses are Lane (R. 122), Knight (R. 128), Luscomb (R. 133), Stewart (R. 139) and Woodside (R. 143).

On cross-examination the engineer, Luscomb (R. 142), was asked as to what distance it would require to get up a speed of from twelve to fifteen miles an hour. He declined to answer this question, and then he was asked what distance it would take to get up a speed of six miles an hour under those conditions, and he answered that he did not know. Then the following occurred:

> "Q. Have you not during that period of time been able to form any approximate estimate of what distance it would take you under those circumstances? Just give us your best judgment; you do not have to be exact?
>
> A. Well, maybe three to five minutes.
>
> Q. That is, to get up to six miles an hour?
>
> A. Yes, sir."

Summarizing the testimony on the question of whether or not the train stopped, there are three witnesses who pretend to testify on that subject: Mrs. Pettit, who could not even see the train until the engine and two or three cars had passed over Bond avenue; McKenzie, who was two blocks away and had to look down street intersections, and who testified that he did not know what happened when he was between intersections, and Ruth Schiele, who could not possibly see from where she was.

On the question of what part of the engine hit respondent, there are only three witnesses who pretend even to know anything about it: Ruth Schiele, who says he was hit by the engine without saying what part of the engine, and who the undisputed evidence shows could not see the engine; Goodwin, who says he was hit by the front part of the engine after the car in front had passed, which would be the end of the engine that is next to the car and, in fact, the back end of the engine, and Edward Walters, who says that he was hit by the front part of the engine, which he says was the end that had the headlight and cow-catcher on it, and which would be the back part of the engine the way the train was moving, and who also testified that while he was on the south side of Bond avenue the engine had crossed Bond avenue when the front part of the engine struck him.

Petitioner, at the close of respondent's evidence and at the close of all the evidence (R. 118 and 164), presented to the Court and requested the Court to give to the jury an instruction in the nature of a demurrer to the evidence. In each instance the Court refused to grant the motion and refused to give the offered instruction, and due exceptions were taken. After the verdict was rendered petitioner filed its written motion for a new trial (R. 179-180). The Court's decision on the motion for new trial is set forth in full in the record (R. 180 to 184, both inclusive), and is a part of the bill of exceptions in the case.

At the time that the Court rendered its decision on the motion for new trial, petitioner excepted to the action of the Court in denying the motion on the ground that after finding the facts found by the Court in its decision on the motion for new trial, it then and there became and was the duty of the Court, under the facts so found by it in the exercise of a sound judicial discretion, to grant said motion for a new trial and to set aside the verdict and judgment in the case and to grant unto petitioner a new trial, and for the further reason that under such facts, so found by the Court in its decision the Court failed to exercise a sound judicial discretion in refusing and denying the motion for a new trial, and for the further reason that the action of the Court in refusing and denying appellant's motion for a new trial was arbitrary and constituted and was an abuse of sound judicial discretion (R. 184).

The Court, in passing on the motion for a new trial, found that witnesses for respondent were most woefully lacking in accuracy of observation; that logically they crossed one another; that no two of them told the same story or gave the same version of the occurrence (R. 180). The Court further found that Ruth Schiele (R. 180-181) could not possibly have seen the accident from the point at which she stood, and calls attention to the fact that she foresaw that contingency and attempted to get around it by claiming to have seen through a gate, but the Court finds there was no gate there for her to see through (R.

181). The Court then found that there were abysmal contradictions, logically considered, in the evidence of respondent's witnesses; that no two of them saw things alike or came within a thousand yards of seeing them alike (R. 181).

The Court then considered the testimony of James Goodwin (R. 181-183) and stated (R. 181) that, while he had no right to make a finding about the matter, yet he was of the view that the testimony of James Goodwin came nearer approximating the truth than that of any other witnesses for respondent; that he stated this because the testimony of Goodwin logically accounted for many things about which other witnesses in the case testified, and that it corroborated the testimony of witnesses for petitioner that respondent was not hit by the front end of the train, and that it serves to throw great light upon how the thing actually must have happened. The Court again referred to the testimony of Goodwin (R. 183) and stated that if his testimony had been looked upon by the jury in a logical way it in nowise helped respondent, because, if Goodwin's testimony is correct, then respondent tried to go between the tender and the engine, out of sight of the train crew, and tried to cross over at a place where nobody could see him or was bound to look for him (R. 183).

The Court further found (R. 181) that the testimony of respondent's witnesses was simply shot full of contradictions and that they could not be reconciled even on the

theory of perjury; and further said (R. 181-182) that, if he were to hazard a guess as to how the thing actually happened, it would be that respondent attempted to pass between the rear end of the car and the front end of the locomotive, and that he was caught there, out of sight of the train crew, and injured. The Court then stated that that was only a theory, but that it seemed to be the only logical one in the case.

The Court then found (R. 182) that he was anxious to get rid of the case; that sympathy evidently played a great part in the verdict; that it is difficult to look at the little fellow without being almost overcome by sympathy, and that the jury were human; that he did not know that anything better would be done about it if he were to grant a new trial and give petitioner a chance to hang another jury. The Court said that he had the power (R. 182) to grant a new trial and that there could be no two views about the question that the verdict in the case is against the weight of the evidence, but the Court took the view that he did not have to grant a new trial on that ground, although he could safely do it. The Court then stated (R. 182) that it was a very close question, all things considered, whether there was any substantial evidence in the case under the federal rule; that he thought there was, legally speaking, substantial evidence, when the evidence was taken at its full value and giving but little consideration to the indefiniteness and contradictions that were obviously present.

The Court then stated (R. 182 and 183) that if he had not tried it once before and the jury had not hung, he would be disposed to set aside the verdict, but that, as it was, he was disposed to let the case be tried out in a court (evidently referring to the Court of Appeals) that has no eye picture of the boy or his situation and his lamentable condition. The Court further said (R. 183) that he would be perfectly safe in setting aside the verdict on the ground that it is against the weight of the evidence, and that if the case had not been tried twice before —once with a nonsuit taken and once with a hung jury— he would set aside the verdict, but that under the circumstances he believed he would let petitioner's counsel try the matter out in the Court of Appeals, which he thought ought to be done and which he predicted would be done.

Before closing his decision, the Court, referring to respondent's witnesses and their credibility, said (R. 184) that inferences were to be drawn from the testimony of many of respondent's witnesses which produce the inevitable conviction that they did not know what they were talking about; witnesses who contended that the train was going ten miles an hour, yet testified that somebody crawled between two box cars while the train was moving, getting from one side to the other, in order to aid the boy. The Court said that that might have happened, but to him it was wholly improbable. He again referred to the fact that one of the witnesses testified that it took him ten minutes to go from a certain place down to the train and

that evidently he was badly mistaken. And again the Court repeated that the evidence was shot through with contradictions and inconsistencies.

The Court, therefore, after finding all of these facts favorable to petitioner; and that the verdict was manifestly and palpably against the weight of the evidence, overruled the motion for a new trial for three reasons: First, because he did not believe, on account of sympathy for the boy, petitioner could ever get a verdict from a jury. Second, that the Court of Appeals could pass upon the cold record (as he called it) and consider the question of liability without sympathy caused by the presence of the boy. Third, that the case had been tried three times, once with the Court about to direct a verdict for petitioner and the consequent nonsuit, and the second with the jury failing to agree, and that if it had not been tried those two times he would grant a motion for a new trial because the verdict was against the weight of the evidence.

This summarized statement is necessary in the length that we make it in order to raise the two questions sought to be raised by petitioner here, namely: First, whether or not a verdict ought to have been directed in favor of petitioner, and, second, whether or not the Court, after its finding of conceded and undisputed facts, in the exercise of sound judicial discretion, ought to have granted a new trial, and whether or not the trial court having failed, after finding facts which required the motion for a new

trial to be granted under the law, to grant a new trial when sound judicial discretion required it so to do, such action was so arbitrary, in view of the conceded and undisputed facts, that said ruling could be assigned as error in the Court of Appeals and in this court.

B.

REASONS RELIED ON FOR THE ALLOWANCE OF THE WRIT.

1. There is not under the federal rule that quantum of evidence in this record sufficient to submit this case to the jury on the question of whether respondent was on and crossing, or attempting to cross, Bond avenue at the time of his injury, and, this being a material element of respondent's case, a verdict should have been directed by the District Court because of failure in the required quantum of evidence in this respect, and the judgment of the District Court should have been reversed by the Court of Appeals for this reason.

2. There is not, under the federal rule, that quantum of evidence in this record sufficient to submit this case to the jury on the question of whether respondent was hit by the front end of the engine, considering the front end as the forward part of the engine the way the train was moving at the time, and, this being a material element of respondent's case, a verdict should have been directed by the District Court because of failure of the required quan-

tum of evidence in this respect, and the judgment of the District Court should have been reversed by the Court of Appeals for this reason.

3. There is not under the federal rule that quantum of evidence in this record sufficient to submit this case to the jury on the question of whether petitioner's servants violated the order of the Illinois Commerce Commission and did not, before passing over Bond avenue, come to a stop and require one of the crew to flag the crossing and warn all persons attempting to cross the crossing of the approach of the train, and, this being a material element of respondent's case, a verdict should have been directed by the District Court because of failure of the required quantum of evidence in this respect, and the judgment of the District Court should have been reversed by the Court of Appeals for this reason.

4. Because there is not under the federal rule that quantum of evidence in this case sufficient to submit this case to the jury on the necessary and material elements of fact necessary to be proven by respondent in order to sustain a verdict in his favor against petitioner. Therefore, a verdict should have been directed in favor of petitioner by the District Court because of failure of the required quantum of evidence in this respect, and the judgment of the District Court should have been reversed by the Court of Appeals for this reason.

5. Because the evidence for respondent upon which the Court of Appeals affirmed the judgment of the District Court is so uncertain, indefinite, conjectural, circumstantial and negative that it cannot, under the federal rule, raise a question of fact upon the material questions in the case against the positive testimony of petitioner's witnesses, and, therefore, the District Court should have directed a verdict in favor of petitioner, and, after the District Court failed so to do, the Court of Appeals should have reversed the judgment of the District Court.

6. Because as to all of the above matters raised, concerning the direction of a verdict in favor of petitioner, the Court of Appeals and the District Court have decided these questions in a way probably untenable and in conflict with the weight of authority, and particularly contrary to the decision of this Court in the recent case of Gunning v. Cooley, 281 U. S. 90, wherein the rules to be applied in determining whether a verdict should be directed are collated and laid down.

7. Because the District Court, in refusing to direct a verdict in favor of petitioner, and the Circuit Court of Appeals, in affirming the judgment of the District Court, have decided a federal question in a way in conflict with the applicable decisions of this Court, in this, that they have failed to apply the rules laid down in Gunning v. Cooley, 281 U. S. 90 (the latest expression of this Court upon that subject), relative to the quantum of evidence required legally to permit the submission of a case to a

jury, and have decided that question contrary to that decision of this Court and the cases therein cited.

8. Because even if, for the purpose of argument, it should be conceded that a jury question was raised by the evidence, yet it was the duty of the trial court, after its finding of conceded and undisputed facts, in the exercise of a sound judicial discretion, to grant a new trial, and the trial court having failed, after finding facts which required the motion for a new trial to be granted, to grant a new trial, when sound judicial discretion required it so to do on such facts so found and conceded, the action of the trial court in refusing to grant a new trial under such circumstances was arbitrary and constituted a failure to exercise sound judicial discretion in determining that matter, and that the Circuit Court of Appeals erred in not reversing the judgment of the District Court for that reason, and under such circumstances the failure of the District Court to grant a new trial and the action of the Circuit Court of Appeals in affirming the judgment with that error assigned can be assigned as error and urged here.

9. In holding that it could not or should not reverse the judgment of the District Court on account of the matters and things set forth in reason No. 8, the Court of Appeals has decided an important question of federal law which has not been, but should be, definitely settled by this Court.

10. In holding that, under the circumstances herein set forth, the action of the trial court in refusing to grant a new trial could not be assigned as error or reversed by the Court of Appeals, the Court of Appeals has so far departed from the accepted and usual course of judicial proceedings, and also sanctioned such a departure by a lower court, as to call for an exercise of this Court's power of supervision.

11. Under the circumstances cited herein, the action of the Circuit Court of Appeals in affirming the trial court upon this last proposition can be assigned here as error, and constituted error under the decisions of this Court.

PRAYER FOR WRIT.

Wherefore, your petitioner respectfully prays that a writ of certiorari be issued out of and under the seal of this Honorable Court, directed to the United States Circuit Court of Appeals for the Eighth Circuit, commanding that Court to certify and to send to this Court for its review and determination, on a day certain to be therein named, a full and complete transcript of the record and all proceedings in the case numbered and entitled on its docket, "No. 8879, Southern Railway Company, a corporation, Appellant, v. Edward Walters, a minor, by Herman Walters, his father and next friend, Appellee"; and that said judgment of the said United

States Circuit Court of Appeals for the Eighth Circuit may be reversed by this Honorable Court, and that your petitioner may have such other and further relief in the premises as to this Honorable Cour. may seem meet and just, and your petitioner will ever pray.

SOUTHERN RAILWAY COMPANY,
a Corporation,

By H. O'B. COOPER,
RUDOLPH J. KRAMER,
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S. R. PRINCE,
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SAMUEL B. McPHEETERS,
Of Counsel.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1930.

No. .....

SOUTHERN RAILWAY COMPANY, a Corporation,
Petitioner,

vs.

EDWARD WALTERS, a Minor, by HERMAN WALTERS,
His Father and Next Friend,
Respondent.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

I.

THE OPINIONS OF THE COURT BELOW.

The opinion of the trial judge in the District Court on the motion for a new trial is not officially reported. It appears in the printed record, from pages 180 to 184, both inclusive.

The opinion of the United States Circuit Court of Appeals for the Eighth Circuit is not yet officially reported, even in the Advance Sheets. The opinion was handed down by the United States Circuit Court of Appeals on

February 14, 1931, and appears in the printed record, from pages 205 to 212, both inclusive.

II.

JURISDICTION.

1. The jurisdiction of this Court is based upon Judicial Code, Sec. 240, as amended by the Act of February 13, 1925, 43 Stats. 938; U. S. Code Annotated, Title 28, Vol. 4, page 359.

2. The original date of the judgment to be reversed is February 14, 1931 (R. 212-213). Petition for rehearing was filed March 10, 1931, within the time provided by the rules of the Circuit Court of Appeals (R. 215), and the petition for a rehearing was denied March 18, 1931 (R. 231).

3. Only two questions are raised in this Court on this record. The first question is whether the trial court should have directed a verdict in favor of petitioner, and whether the Circuit Court of Appeals erred in not reversing the judgment of the trial court because of its failure to direct a verdict for petitioner. This question was raised by a proper motion and written instruction offered at the close of respondent's evidence (R. 118), and by proper motion with written instruction requested at the close of all the evidence in the case (R. 164). These motions were in the nature of demurrers to the evidence, with written instruc-

tions submitted at each time, instructing the jury that under the pleadings and the evidence adduced their verdict should be for petitioner (R. 118 and 164).

The second and only other question raised here is whether or not the trial court exercised sound judicial discretion and did not act arbitrarily when it overruled petitioner's motion for a new trial, and whether or not the judgment of the trial court should have been reversed by the United States Circuit Court of Appeals for such reason. This question was raised by petitioner's exception to the action of the trial court in overruling and denying the motion for a new trial, and in refusing to set aside the verdict and judgment herein, and to grant unto petitioner a new trial for the reasons as then assigned in the exception (R. 184) that after finding the facts found by the Court in its decision on the motion for a new trial, it then and there became and was the duty of the trial court under such facts so found by it, in the exercise of a sound judicial discretion, to grant said motion for a new trial and to set aside the verdict and judgment herein, and to grant unto petitioner a new trial, and for the reason that under such facts so found by the Court in its decision on the motion for a new trial the Court failed to exercise its sound judicial discretion in refusing and denying said motion, and for the reason that the action of the Court in refusing and denying petitioner's said motion for a new trial was arbitrary and constituted and was an abuse of sound judicial discretion by the Court (R. 184-185).

In the United States Circuit Court of Appeals the question concerning the direction of a verdict was raised by the third, fourth, fifth and sixth assignments of error (R. 22), and the question relative to the failure of the Court to exercise sound judicial discretion in passing on the motion for a new trial was raised by the seventh and eighth assignments of error (R. 22-23).

4. Counsel for petitioner know of no case since the amendment of Section 240 of the Judicial Code by the Act of February 13, 1925, expressly sustaining the jurisdiction of this Court to issue its writ of certiorari in a case of this character. However, section 240, as amended, clearly confers discretionary jurisdiction upon the Court to bring up a case of this character from the Circuit Court of Appeals by certiorari, and subparagraph B of paragraph 5 of Rule 35 of this Court clearly recognizes such right.

III.

STATEMENT OF THE CASE.

The essential facts of the case are fully stated in the accompanying petition for certiorari, and in the interest of brevity are not repeated here. Any necessary elaboration of the evidence on the points involved will be made in the course of the argument which follows.

IV.

SPECIFICATION OF ERRORS.

1. The District Court erred in refusing to give and read to the jury the written request for an instruction in the nature of a demurrer to the evidence, asked by petitioner at the close of all the evidence offered in the case, which said instruction so offered and then and there refused by the Court is in words and figures as follows, to wit:

> "At the close of all the evidence in the case the Court instructs the jury that under the law, the pleadings and the evidence plaintiff is not entitled to recover, and your verdict must be for defendant."

2. The United States Circuit Court of Appeals for the Eighth Circuit erred in refusing to reverse the judgment of the District Court on account of the error of the District Court as set forth in specification of error No. 1 herein.

3. The District Court erred in overruling and denying petitioner's motion for a new trial in this case, and in refusing to set aside the verdict and judgment herein and in refusing to grant unto petitioner a new trial, as requested and prayed by the petitioner, for the reason that after finding the facts found by the District Court in its decision upon such motion for a new trial, it then and there became and was the duty of the District Court under such facts so found by it, in the exercise of a sound judicial discretion to

grant said motion for a new trial, and to set aside the verdict and judgment herein, and to grant unto petitioner a new trial, and for the reason that under such facts so found by the District Court in its decision aforesaid, the District Court failed to exercise its sound judicial discretion in refusing and denying said motion, and for the reason that the action of the District Court in refusing and denying petitioner's said motion for a new trial was arbitrary and constituted and was an abuse of sound judicial discretion by the District Court.

4. The United States Circuit Court of Appeals for the Eighth Circuit erred in refusing to reverse the judgment of the District Court on account of the refusal of the District Court to grant petitioner's motion for a new trial for the reasons set forth in specification of error No. 3 herein.

5. The United States Circuit Court of Appeals for the Eighth Circuit erred in affirming the judgment of the District Court.

6. The United States Circuit Court of Appeals for the Eighth Circuit erred in failing and refusing to reverse the judgment of the District Court.

V.

SUMMARY OF THE ARGUMENT.

Point A. The trial court should have directed a verdict in favor of petitioner, and the United States Circuit Court

of Appeals should have reversed the judgment of the trial court on account of its failure so to do.

Point B. The trial court, in the exercise of a sound judicial discretion, after its findings on the motion for a new trial, should have granted a new trial to petitioner, and the United States Circuit Court of Appeals should have reversed the judgment of the trial court on account of its failure so to do.

VI.

ARGUMENT.

Point A.

The trial court should have directed a verdict in favor of petitioner, and the United States Circuit Court of Appeals should have reversed the judgment of the trial court on account of its failure so to do.

Under the facts in this case, when considered in connection with the well-established rule in the federal court relative to the direction of a verdict, a verdict should have been directed for petitioner in this case. Under the federal rule a scintilla of evidence is not sufficient, but there must be reasonable and substantial evidence for the plaintiff before the case can be submitted to the jury, and the evidence in favor of the plaintiff must be of such a conclusive and substantial character that if a verdict were returned for the plaintiff the Court would not have to set it aside in

the exercise of sound judicial discretion. If the Court, even with conflicting evidence, in the exercise of sound judicial discretion, ought to set aside a verdict for the plaintiff, if rendered, then, under such circumstances, a verdict should be directed in favor of the defendant, even if the evidence be conflicting; yet if it is all on one side, or is so overwhelmingly on one side as to leave no doubt as to what the fact is, the Court should give a peremptory instruction.

Hardy-Burlingham Mining Company v. Baker, 10 F. (2nd) 277, 278, 279;
Norfolk and Western R. R. Co. v. Collingsworth, 32 Fed. (2nd) 561;
Kansas City Southern R. R. Co. v. Jones, 276 U. S. 303;
Delaware R. Co. v. Koske, 279 U. S. 7;
Atlantic Coast Line v. Davis, 279 U. S. 34;
Small v. Lamborn Co., 267 U. S. 248-254;
Roberts Federal Liability of Carriers (2nd Ed.), Vol. 2, Sec. 1028, pp. 1970-1971;
C. M. & St. P. Ry. Co. v. Coogan, 271 U. S. 472;
St. L. I. M. & S. Ry. Co. v. McWhirter, 229 U. S. 265;
St. L. & S. F. Ry. Co. v. Mills, 271 U. S. 344;
Atlantic Coast Line v. Driggers, 279 U. S. 787;
W. & A. R. R. Co. v. Hughes, 278 U. S. 496;
Gunning v. Cooley, 281 U. S. 90 (Adv. Sheets, Vol. 1);
Slocum v. N. Y. Life Ins. Co., 228 U. S. 364-369;
Improvement Co. v. Munson, 14 Wall. 442-448;
Pleasant v. Fant, 22 Wall. 116-122;

N. Y. C. R. Co. v. Ambrose, 280 U. S. 486;
M. & R. V. Ry. Co. v. U. S., 270 U. S. 280;
Lamborn v. Woodard, 20 Fed. (2nd) 635-637.

A scintilla or modicum of conflicting evidence, irrespective of the character and measure of that to which it is opposed, does not require the submission of the case to the jury.

Small v. Lamborn Co.; 267 U. S. 248-254.

In order legally to permit the submission of a case to the jury there must be reasonable evidence to show the breach of duty by the defendant.

Delaware R. Co. v. Koske, 279 U. S. 7.

And the evidence for the plaintiff must be substantial evidence before the case can be submitted to the jury.

Atlantic Coast Line v. Davis, 279 U. S. 34.

The legal effect of the evidence is a question of law.

M. & R. V. Co. v. U. S., 270 U. S. 280.

Whenever circumstantial evidence is relied upon to prove a fact, the circumstances must be clearly proven and not themselves presumed.

C. M. & St. P. Ry. Co. v. Coogan, 271 U. S. 472-477.

If the record leaves the matter in the realm of speculation and conjecture, then a verdict should be directed.

C. M. & St. P. Ry. Co. v. Coogan, 271 U. S. 472-477.

In the recent case of Gunning v. Cooley, 281 U. S. 90, this Court has summarized and laid down the rules relative to the direction of a verdict. So far as this case is concerned that case may be summarized as holding that a verdict should be directed: 1. Where the evidence, with all reasonable inferences, does not constitute a sufficient basis for a verdict for the plaintiff, so that such a verdict if returned would, in the exercise of sound judicial discretion, have to be set aside by the Court. (Also see Small v. Lamborn Co., 267 U. S. 248-254.) 2. Where even though there be a scintilla of evidence to sustain plaintiff's case, and even though there be some evidence for the plaintiff, yet it is not evidence upon which a jury can properly proceed to find a verdict for the plaintiff. 3. Where the evidence upon any issue is all on one side, or so overwhelmingly on one side as to leave no room to doubt what the fact is.

Petitioner concedes that issues depending upon the credibility of witnesses or the weight of the evidence are to be decided by the jury if the evidence is reasonable and substantial and attains the dignity required. It further concedes that the evidence for the plaintiff must be taken to prove all that it reasonably may be found sufficient to establish. Under these rules (which we think will be

undisputed) the first question that arises is whether or not there was that quantum of reasonable and substantial evidence on behalf of respondent to require this case to be submitted to the jury.

Petitioner's counsel will not repeat here what has been said in the statement of facts. Our contention is that under those facts the evidence for the respondent is inconclusive, indefinite, speculative, conjectural, negative and circumstantial in character, not based upon a proper knowledge of or ability to know the facts concerning which they testified, and that it cannot make a question of fact in this case against the positive testimony of five witnesses that the train stopped and that the crossing was flagged, and that respondent was not hit by the front end of the engine the way the train was traveling, which would be the end that the tender was on.

In addition to calling attention to our statement of facts as to what the evidence was on these two propositions, necessary to make out respondent's case, we desire only to correct here some misstatements and improper deductions as to the evidence in the opinion of the Circuit Court of Appeals.

To make out respondent's case it was necessary to prove that the train did not stop as required by the Commission's order; that respondent was hit by the front end of the train the way it was moving, and that the failure to stop, if the train did fail to stop, and the failure to flag the

crossing, if it was not flagged, was the proximate cause of respondent's injuries.

We have no point to make on the question of proximate cause, because if the boy was hit by the front end of the engine the way it was moving, and if the train did not stop, and the crossing was not flagged, then the failure to stop would be the proximate cause of his injuries; at least a question of fact would be raised upon that proposition if the first two propositions are proven.

In the printed record (R. 215-229) appears petitioner's petition for rehearing in the Court of Appeals. On the question of the motion to direct and the reference in the opinion to the failure to except to the charge, we call attention to the fact that the decision on the motion to direct came up before the charge was given and the point was then saved and nothing in the charge, or failure to except to it, could change the legal situation as to whether or not the motion should have been granted when offered. Furthermore, a reference to the Court's charge (R. 170) will show that the Court did submit to the jury the question of whether the front end or the rear end of the engine hit respondent.

As to Ruth Schiele's testimony, quoted in the opinion of the Court of Appeals, we call attention to the trial judge's commentary on her testimony (R. 181), and the fact that there was no gate through which she said she could see, and that she could not see through the gate she says she saw through.

Furthermore, in regard to the testimony of the engineer on cross-examination (R. 142), we call attention to the fact that he was only asked for an approximation and that the question was as to distance and the answer was as to time, thereby making an unintelligible answer to the question.

As to the testimony of McKenzie, referred to in the opinion, our statement answers the Court upon that proposition. The opinion of the Court of Appeals says that McKenzie testified the train was moving at a rate of speed of fifteen miles per hour. An examination of his testimony will show that he did not make such a statement, but he said (R. 64) that he was traveling in his automobile at a speed of fifteen miles per hour, and, as shown in our statement, the testimony that he was traveling fifteen miles an hour, and not the train, corroborates petitioner's witnesses that the speed of the train was never in excess of five or six miles per hour.

The opinion of the Court of Appeals mentions the testimony of Thomas Heher as sustaining respondent's case. Instead of sustaining respondent's position it sustains petitioner's position, because this witness testified (R. 52) that it took the train ten minutes to go from half a block south of Bond avenue to six car lengths north of Bond avenue. His testimony also shows that he never saw the train from ten minutes before the accident until after the accident, and this testimony sustains petitioner's position that the train did stop.

That Corda Pettit, whose testimony is quoted in the opinion, could not know anything about it when she said that the train did not stop is shown by her testimony (R. 28-31) that when she first saw the train the engine and several cars had crossed over Bond avenue. The trial judge then took her in hand (R. 32) and clearly showed that she could not know whether the train stopped before it reached Bond avenue.

Furthermore, as to the testimony of Mrs. O'Dell, quoted in the opinion, petitioner submits that the Court there overlooked the fact that her negative testimony that she did not see any men on the engine cannot raise a question of fact against the positive testimony of the train crew that men were on the front end of the engine.

With reference to the testimony of James Goodwin, the Court of Appeals apparently also overlooked his testimony, as set forth in our statement of facts, and also Judge Faris' statement to the jury as to what his testimony was (R. 170), and the trial judge's characterization of the testimony and what it showed on the motion for a new trial (R. 181-183).

On the question of the speed of the train, attention is called to the trial judge's charge to the jury on the question (R. 166), and to his statement concerning it on the motion for a new trial, and particularly his characterization of these witnesses attempting to testify on the question of speed (R. 184). Furthermore, as to Mrs. O'Dell's

testimony, the Court of Appeals overlooked her testimony on redirect examination (R. 43), where she said it took fifteen to twenty minutes for the train to go by, and that she thought it never would go by—it was moving so slowly.

The Court of Appeals also overlooked upon this point the fact that the negative, uncertain, speculative and circumstantial, conjectural testimony of these witnesses was merely a conclusion, based upon unsubstantial information, and being uncertain, speculative, circumstantial, conjectural and negative, without any basis to give it strength, cannot prevail against the positive testimony of the train crew upon these material questions so as to make a question of fact for the jury.

Therefore, petitioner submits under this point that there was not that quantum of reasonable, certain and substantial evidence upon the material points so as to permit this case properly to be submitted to a jury, but that the trial court ought to have directed a verdict for petitioner, and that the judgment of the trial court should have been reversed by the Court of Appeals for its failure so to do, and that this petition for certiorari ought to be granted in order that upon full and complete hearing of the cause the error committed by the trial court and the Court of Appeals may be here corrected.

Point B.

The trial court, in the exercise of a sound judicial discretion, after its findings on the motion for a new trial, should have granted a new trial to petitioner, and the United States Circuit Court of Appeals should have reversed the judgment of the trial court on account of its failure so to do.

The Court's opinion in deciding the motion for new trial, which is summarized in the statement and set forth in full in the printed record (R. 180-184), and the exceptions thereto (R. 184-185), is the basis for raising this point here.

At the ontset of our argument on this point, we concede, as we did in the Court of Appeals, that ordinarily the denial of a motion for a new trial, being in the discretion of the trial court, is not reviewable on appeal, and call attention to the fact that we raised this point in the Court of Appeals and are raising it here solely on the ground that, after the Court found the facts as it did, the Court acted arbitrarily and failed to exercise sound judicial discretion in applying the law to those findings of fact. That under such circumstances the action of the Court in denying the motion for new trial can be assigned as error is clearly set forth by the authorities. A leading case on this subject is Felton v. Spiro, 78 Fed. 576, where this rule was laid down in an opinion by Mr. Justice Taft, then a Judge of the Sixth Circuit, in which Judge

Lurton concurred as a member of the Court, and which laid down the rule above stated on the authority of Mattox v. U. S., 146 U. S. 140; Ry. Co. v. Lowery, 74 Fed. 463, and Insurance Co. v. Randolph, 78 Fed. 754. Furthermore, in Union Tool Co. v. Wilson, 259 U. S. 107-112, this Court, in an injunction case, where the same rule as to discretion applies, said that legal discretion does not extend to a refusal to apply well-settled principles of law to a conceded state of facts. This Court, in support of its decision on that point, cited Winchester Repeating Arms Co. v. Olmsted, 203 Fed. 493. To the same effect is In re Sobol, 242 Fed. 487-489.

In the case of Eureka Tool Company v. Wire Rope Appliance Co., 265 Fed. 669, decided by the Circuit Court of Appeals for the Ninth Circuit, the trial court made certain findings of fact and then found the defendant in errror not guilty of contempt. Upon review, the Circuit Court of Appeals held that the only conclusion it could come to under the findings of the District Court was that it was an abuse of sound judicial discretion on the part of the District Court to purge the defendant in error of contempt, and for that reason reversed the judgment of the District Court. In this case certiorari was denied by this Court in 254 U. S. 624.

To the same effect are the cases of City of Des Moines v. Des Moines Water Co., 230 Fed. 570-574, and United Press Association v. National Newspaper Association, 254 Fed. 284-285.

The law upon the subject is well stated and forcefully laid down by the United States Circuit Court of Appeals for the Eighth Circuit in Paine v. St. Paul Union Stock Yards Co., 28 Fed. (2nd) 463, where the Circuit Court of Appeals for the Eighth Circuit said:

> " 'Speaking generally, an order granting or denying a motion for a new trial in the federal court is discretionary with the trial court, and is not reviewable on writ of error, or on appeal (Holmgren v. United States, 217 U. S. 509, 521, 30 S. Ct. 588, 54 L. Ed. 861, 19 Ann. Cas. 778; Clyde Mattox v. United States, 146 U. S. 140, 147, 13 S. Ct. 50, 36 L. Ed. 917).
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> " 'The action of the Court, however, must not be arbitrary. It may not grant a new trial merely because one of the parties so desires, or for reasons which are not recognized as legitimate grounds for such action. The Court should keep within well-recognized rules in dealing with such a motion. Otherwise there is an abuse of discretion, and in such cases, very properly, a review may be had (United Press Association v. National Newspaper Association [C. C. A.], 254 F. 284 [8th Circuit]; Yeates v. United States [C. C. A.], 254 F. 60; Vallery v. Glenwood Irr. Co. [C. C. A.], 248 F. 483 [8th Circuit]).' "

And further, on the same page, said:

> "The granting of a new trial is, generally speaking, within the discretion of the trial judge, and, unless that discretion patently has been abused, his ruling on a motion for a new trial is not subject to review (Mattox v. United States, 146 U. S. 140, 147, 13 S. Ct.

50, 36 L. Ed. 917; Newcomb v. Wood, 97 U. S. 581, 24 L. Ed. 1085; Holmgren v. United States, 217 U. S. 509, 521, 30 S. Ct. 588, 54 L. Ed. 861, 19 Ann. Cas. 778). He cannot, of course, refuse to exercise his discretion, and, if he does so refuse, then that is a matter for the examination of the Court of Appeals (Felton v. Spiro [C. C. A.], 78 F. 576, 579; Mattox v. United States, 146 U. S. 140, 147, 13 S. Ct. 50, 36 L. Ed. 917; Ogden v. United States [C. C. A.], 112 F. 523, 525)."

The Court further filed an additional opinion to the same effect on rehearing in the last mentioned case, which is reported in 35 Fed. (2nd) 624.

In Railroad Company v. Moon, 121 U. S. 558, l. c. 570, this Court said:

"In many cases it might be the duty of the Court to withdraw the case from the jury, or to direct a verdict in a particular way; and yet in others, where it would be proper to submit the case to the jury, it might become its duty to set aside the verdict and grant a new trial."

In its opinion on this question the Court of Appeals (R. 211-212) merely says that this is not a case in which the lower court arbitrarily refused to consider the motion for a new trial, and without further statement holds that under such circumstances the action of the trial court could not be assigned as error or considered on appeal. It is true

that the District Court passed on the motion for a new trial, but the Court found facts that sustained petitioner's contention in every way; the fact that the witnesses for the respondent were not to be believed with the exception of the boy, Goodwin; the fact that his testimony corroborated the testimony of petitioner's witnesses; the fact that the verdict is palpably and manifestly against the weight of the evidence, and then after such findings, which required a new trial to be granted if the Court so believed (and his findings to that effect appear in the bill of exceptions). The Court assigned three reasons for not granting the motion for a new trial: First, the Court said that he did not believe that with the natural sympathy that would exist for the boy that a verdict could ever be obtained in favor of petitioner, no matter what the evidence was. It is submitted that this was not sufficient ground to refuse the motion for a new trial, and it shows that the Court did not exercise sound judicial discretion when he overruled the motion for that reason. Second, the Court assigned as a reason for not granting the motion that the case ought to go to another court on a cold record, where, without a picture of the boy and the sympathy thereby excited, the Appellate Court could pass upon the question without the sympathy of the boy's presence. That this was not exercising sound judicial discretion is apparent, for the reason that under the law the Circuit Court of Appeals cannot review facts in a jury case except to determine whether or not there is sufficient evidence for the case

to go to the jury; and after the trial court expressed an opinion on the motion for a new trial it was his duty, in the exercise of sound judicial discretion, to grant it and not send it on to another court for a wrong reason, and to a court which had not the right to pass upon the facts as the trial court did. Third, the main reason assigned by the trial court for not granting the motion for a new trial was that the case had been tried twice before. The trial court expressly said that if it had not been tried twice before he would grant a new trial. This verdict is the first verdict that was ever returned against petitioner. It is not a case where two or more verdicts had been returned for a party. In the first trial in the federal court at East St. Louis, the Court being of the opinion that respondent had not made out a case and being about to direct a verdict, respondent took a nonsuit. In the former trial in the District Court at St. Louis, the jury failed to agree. We submit that this is not sufficient justification for the Court to refuse a new trial after finding from the facts that one should be granted.

At common law a court could set aside a verdict when against the weight of the evidence, and such right was not taken away by the Seventh Amendment to the Constitution (Felton v. Spiro, 78 Fed. 576, 582, 583). True, the exercise of the right is discretionary with the trial court, but that discretion must be a sound judicial discretion. As said in other cases cited herein, the discretion used must be sound judicial discretion, and the duty to grant

the motion exists when the verdict is palpably and manifestly against the evidence, even though conflicting. Here the trial court found that the discretion ought to be exercised except for three reasons, none of which were sufficient and all of which were unsubstantial. As Judge Taft said in Felton v. Spiro, 78 Fed. 576-583:

> "The defendant receiver, therefore, is entitled to have the court below weigh all his evidence, and exercise its discretion to see whether or not in its opinion the verdict was so opposed to the weight of the evidence that a new trial should be granted."

Here the Court did not exercise its sound judicial discretion, but after finding that the motion for a new trial ought to have been granted except for the three reasons stated, denied the motion for a new trial for those three reasons alone, none of which are sufficient.

Therefore, we find this case as above set forth, with every finding in favor of the petitioner and with the refusal after such findings to grant the motion for reasons that are unsubstantial and not sufficient in law; and we submit that the Court acted arbitrarily after finding the facts as it did and failed to exercise sound judicial discretion when it overruled and denied petitioner's motion for a new trial.

This precise question, so far as we have been able to find, has never been passed upon by this Court. The cases from this court cited by analogy, in our opinion,

sustain our position, as do the cases cited from the courts of appeal. This important question, we submit, ought to be determined finally and authoritatively by this Court.

CONCLUSION.

It is, therefore, respectfully submitted that this case is one calling for the exercise by this Court of its supervisory powers, in order that the errors herein pointed out may be corrected; that the law may be properly and authoritatively defined, and that the judgment of the District Court and of the United States Circuit Court of Appeals for the Eighth Circuit should be reversed in order that justice may be done to petitioner; and that to such an end a writ of certiorari should be granted and this Court should review the decision of the United States Circuit Court of Appeals for the Eighth Circuit and finally reverse it.

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